United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-4278

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REA EXPRESS, INC., BANKRUPT, C. ORVIS SOWERWINE,
TRUSTEE IN BANKRUPTCY, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, RESPONDENTS

ON PETITION FOR REVIEW OF ORDERS
OF THE INTERSTATE COMMERCE COMMISSION

JOINT BRIEF OF THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES

DONALD I. BAKER
Assistant Attorney General

LLOYD JOHN OSBORN
Attorney
Department of Justice
Washington, D.C. 20530

MARK L. EVANS
General Counsel

CHARLES H. WHITE, JR.
Associate General Counsel
Interstate Commerce Commission
Washington, D.C. 20423

MARCH 1977

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Regulations	Page
49 C.F.R. 1101.1(a)	2, 19, 20, 26
49 C.F.R. 1101.4	24
49 C.F.R. 1100.247(f)	15
5 U.S.C. 558(c)	23
49 U.S.C. 310(a)	2, 19, 20
49 U.S.C. 312	26
49 U.S.C. 312(a)	24
49 U.S.C. 911(a)	2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4278

REA EXPRESS, INC., BANKRUPT,
C. ORVIS SOWERWINE,
TRUSTEE IN BANKRUPTCY,
PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, RESPONDENTS

ON PETITION FOR REVIEW OF ORDERS
OF THE INTERSTATE COMMERCE COMMISSION

JOINT BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES

ISSUE PRESENTED

In our view one central issue is presented. Was the Interstate Commerce Commission warranted in dismissing a bankrupt and liquidated carrier's application for permanent authority to provide Nationwide express service?

A subsidiary issue is also raised. Given the post-bankruptcy dismissal of the defunct carrier's application for permanent authority, was the agency warranted in terminating the temporary authoirty appurtenant thereto?

STATUTES AND REGULATIONS INVOLVED

Section 210a of the Interstate Commerce Act, 49 U.S.C. 310(a) provides:

> (a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

49 C.F.R. 1101.1(a) provides:

> Any temporary operating authority granted under 210a(a) or 311(a) of the Interstate Commerce Act (49 U.S.C. 310a(a), 911(a)) is continued in force, beyond the expiration date specified in such temporary operating authority for a certificate of public convenience and necessity or a permit to engage in operations authorized by such temporary operating authority.

STATEMENT

Notwithstanding petitioner's hyperbole, this is not a case in which the Commission destroyed "an entire mode of transportation" or brought about a termination of REA's "full-spectrum express service" (Pet. Br. p. 6). Rather, it is simply an instance where the agency, faced with a defunct carrier that was providing no express service whatsoever, sensibly recognized "the probability that a bankrupt and liquidated carrier will not and cannot prosecute its outstanding applications" (Order of Nov. 17, 1976, p. 20, emphasis in original), and accordingly dismissed its unprosecuted application for permanent authority. Necessarily with this dismissal came the termination of the appurtenant temporary authority.

To enable the Court to understand better the background of the Commission's post-bankruptcy REA order, we will briefly trace the evolution and demise of REA.

Background of REA Express

Before the Commission was established in 1887, express companies were recognized adjuncts to the Nation's railroad industry. These companies provided shippers expedited service for small packages by performing necessary pick up and delivery to and from a railroad which was responsible for the movement of the goods. It was understood early, however, that a primary duty to furnish express service rested with the railroads themselves. REA Express, Inc., Application for ETA, 117 M.C.C. 80, 81 (1971); Express Companies, 1 I.C.C. 349 (1887).

When originally passed, the Act to Regulate Commerce did not empower the Commission to regulate express companies. The Hepburn Act of 1906 changed that and extended the Commission's authority to express companies by defining them as carriers.

In order to mobilize for World War I, the various express companies, at the request of the Director General of Railroads, were consolidated into a single entity to more effectively conduct express operations. With the cessation of hostilities, the Transportation Act of 1920 ended Federal control of the railroads. The unified express company -- American Express Railway Company -- did not, however, revert to its previous constituent parts and continued to exist until 1929. See Railway Express Agency, Inc., Notes, 348 I.C.C. 157, 167 (1975); Consolidation of Express Cos., 59 I.C.C. 459 (1920).

certain problems arose in the rate relationship established between the single for-profit express company and the Nation's railroads. See Railway Express Agency, Inc., Notes, supra, 348 I.C.C. at 168. These problems led the Nation's railroad industry to conceive a plan for collectively establishing a single, non-profit agency to serve the industry. Railway Express Agency, Inc. thus was created as a non-profit agency to serve the industry that jointly owned and controlled it. Securities and Acquisition of Control of Ry. Exp. Agency, 150 I.C.C. 423 (1929).

This non-profit agency arrangement continued until 1969. While Railway Express Agency remained a non-profit entity with its earnings or losses channeled to the share-holding railroads its performance became a drain on the industry. Accordingly, numerous railroads became increasingly dissatisfied and sought to end their joint venture with REA. The court in REA Express, Inc. v. Alabama Great Southern Railroad Co., 343 F. Supp. 851 (S.D. N.Y. 1972), aff'd on appeal, 412 U.S. 934, succinctly summarized the events which culminated in REA's change from a non-profit industry-controlled agency to a for-profit enterprise (343 F. Supp. at 855):

> . . . In the next several years, the earnings picture for the company got no better, and in 1967 and 1968 REA management made several unsuccessful attempts to find a purchaser for the REA stock owned by the railroads.
>
> REA's financial adviser informed management that no interested purchaser would be found unless the 1959 operating agreement was terminated and REA freed from railroad control. In light of this advice, most of the shareholding railroads deposited their stock in a voting trust on June 10, 1968, the trustees of which were not associated with the

railroads. The trustees were given full powers of shareholders, including the power to sell their shares if the owners of voting trust certificates representing a majority of the deposited stock approved the sale. In addition, by June 18, 1968, it was agreed that the 1959 operating agreement be terminated on December 31, 1968.

On June 23, 1969, the voting trustees received an offer to purchase their REA stock from 5 executive officers of that company. The purchase price was $1 per share plus 3/10 of a warrant in a new company to be called the REA Holding Corporation. The offer was to remain in effect until July 9, 1969.

By that date the voting trustee had received consents to the offer from a majority of the deposited stock and the offer was accepted. On August 1, 1969, the formal agreement of sale was executed, and by August 21, 1969, the deal had been consummated. . .

REA's fortunes did not improve after it separated from railroad ownership.[1/] In fact they deteriorated sharply. See the excerpts of the Commission's Annual Reports to Congress for the years 1972 through 1975 at pp. 10-14, Order of Nov. 17, 1976.

1/ In REA Express, Inc., Application for ETA, supra, 117 M.C.C. at 87, the following table appears:

Fiscal year	Shipments	Net loss
	Millions	Millions
1968----------	41.1	$17
1969----------	31.4	43
1970----------	22.8	8
1971----------	17.1	14

On February 18, 1975, REA Express filed for reorganization under Chapter XI of the Bankruptcy Act and continued operations in a Debtor-in-Possession status. After filing for reorganization the Debtor-in-Possession established its REXCO Division and commenced certain operations (i.e., truckload, irregular route) which were wholly antithetical to REA's express service authorization.

On November 6, 1975, REA Express was adjudicated a bankrupt and was ordered liquidated. The next day REA Express issued an Embargo Notice which placed an embargo on all traffic tendered it. Three days later REA Express amended its Embargo Notice No. 1 by exempting REXCO Division's operations from the embargo.

The continued REXCO operations excited a storm of protest from properly authorized motor carrier interests which initiated the proceedings now here on review. With the issuance of the Commission's cease and desist order, all the so-called REXCO operations terminated. The petitioner does not challenge the propriety of the Commission's cease and desist order.

Orderly liquidation of REA's physical assets has now been completed.

Background Of This Litigation

The Commission's orders, which were issued after REA Express filed for reorganization and was adjudicated bankrupt, are the culmination of trends easily discernible before the crisis of bankruptcy hit. As we pointed out above, REA's predecessors were historically railroad related. But just as REA was divorced from railroad ownership and control, so too did the demise of the railroads' passenger train service set in motion events which would unalterably change REA, if not foredoom it.

Even while REA was an owned instrumentality of the railroad industry it realized that it needed motor carrier authority to supplement its basic rail-related system of operation. Between 1939 and 1962 it received almost 1,700 motor carrier operating rights from the Commission. REA Express, Inc., Application for ETA, supra, 117 M.C.C. at 82. These fragmented authorities (which are not the subject of this appeal) did not in themselves provide REA the wherewithal to conduct a cohesive nationwide truck-oriented express service. Rather, they were applied for and received largely to replace the quickly disappearing passenger trains. But just as individual passenger train discontinuances followed no coordinated overall National scheme, REA's resulting motor carrier authorities did not cumulatively amount to a cohesive system. The 1,700 certificates were a patchwork quilt.

To bring order out of the chaos created by the disappearance of the passenger trains and the unsystematic accumulation of fragmented and limited motor carrier authority, REA conceived its so-called "Hub" system -- the unprosecuted permanent application of which is the subject of this lawsuit.

REA's "Hub" system consisted of a grouping of the Nation's 24 major production areas identified by the Bureau of the Census. Each of the "hubs" was to be connected with the others by a motor regular route authority or a rail line-haul route, or by a combination of both.

Each of the "hubs" would be the collecting point for the surrounding "satellite" area. Service between points in the "satellite" area and the "hub" was to be provided by REA by all-motor operations.

REA's "hub" plan was presented to the Commission in 1968 while the express agency was still owned and controlled by the railroads.[2/] The old management, however, did not prosecute the permanent "hub" authority application. Neither did the new management.

2/ The permanent "hub" application was docketed as MC-66562 (Sub-No. 2345, Part No. 181). The corresponding temporary authority is MC-66562 (Sub-No. 2308TA).

After a pre-hearing conference in early 1970, the management of the new "for-profit" REA allowed the permanent "hub" application to lie dormant through the years of increasing losses, bankruptcy and liquidation. Indeed, the new management affirmatively represented that it did not intend to prosecute its permanent "hub" application, for to do so "would do the Commission, the public and REA a considerable disservice (Ex. 5, p. 13).

This remarkable statement was made in the context of REA's attempt to rid itself of one of the defining characteristics of express service -- that it be performed over regular routes. (REA unsuccessfully sought Nationwide irregular route authority. See REA Express, Inc. -- Application for ETA, supra.)

True to its word, REA never prosecuted its permanent "hub" application which incorporated a system of regular routes. The Commission was, thus, fully warranted in finding that ". . .in effect, it repudiated that approach, and specifically expressed its intention to dismiss the Hub proceeding. . ." (Order of Nov. 17, 1976, p. 20).

After REA petitioned for reorganization, it commenced, via its REXCO Division, truckload lot irregular route operations. This uncertificated invasion of an established market understandably brought a number of protests from duly certificated irregular route carriers. A number of motor carriers filed complaints seeking a cease and desist

order against the REXCO operations. Additionally American Trucking Associations filed petitions seeking dismissal of REA's unprosecuted permanent "hub" application and cancellation of its temporary authority. By order of April 5, 1976, the Commission consolidated all the proceedings into Docket No. MC-C-8862, Brada Miller Freight System, Inc. v. REA Express, Inc.[3/]

Thus, as a result of the consolidation of the ATA petitions with the complaints seeking a cease and desist order, REA, or more accurately its trustee was put on notice that dismissal of the unprosecuted application and termination of the corresponding temporary authority were to be the subject of hearings along with the cease and desist issue.

Hearings were conducted before an Administrative Law Judge from August 30, 1976 to September 22, 1976. The Commission's decision was rendered on November 17, 1976. In it the Commission determined that REXCO's irregular route operations were inconsistent with REA's express, regular route authority and ordered the illegal operations ceased. The Commission also dismissed the liquidated carrier's unprosecuted permanent application and terminated the temporary authority appurtenant thereto.

3/ This proceeding embraced Docket Nos. MC-C-8864, Schneider Transport, Inc. v. REA Express, Inc.; MC-C-8867, American Trucking Associations, Inc. v. REA Express, Inc.; MC-C-8874, Associated Truck Lines, Inc. et al. v. REA Express, Inc.; MC-66562 (Sub-No. 2345) (Part No. 181), REA Express, Inc. -- Petition of American Trucking Associations, Inc. for Dismissal of Application; and MC-66562 (Sub-No. 2803TA), REA Express, Inc. -- Petition of American Trucking Associations, Inc. for cancellation of Temporary Authority.

After petitions for reconsideration were filed, the Commission, by Order of January 27, 1977, reaffirmed its decision to dismiss the unprosecuted application and terminate the appurtenant temporary authority. The order also denied late intervention petitions of certain labor representatives on the ground that they had actual notice of the proceedings but did not move to intervene until after the hearings were completed and the full Commission had issued its report and order.

In a separate but related proceeding, Alltrans Express U.S.A., Inc., intervenor in this review, has filed applications with the Commission for authority to operate REA's certificates and temporary authority. (Alltrans Br., p. 4). Supporting those applications is a contract offer made in the REA bankruptcy proceeding. The Commission's actions in the Alltrans proceeding are not under review here.

By order of January 5, 1977, this Court granted a stay of the Commission's REA orders, pending judicial review. Additionally, an expedited briefing and argument schedule was established.

SUMMARY OF ARGUMENT

Despite the fact that petitioner devotes the bulk of its brief to REA's illegal REXCO operations, it does not here challenge the Commission's cease and desist order and confirms that the REXCO operations have been terminated (Pet. Br. p. 19). Rather, the Trustee attacks the Commission's orders insofar as they dismiss the liquidated carrier's unprosecuted permanent authority application, and thus necessarily terminate the temporary authority appurtenant thereto.

In the first place, we will show that the Commission acted not only legally but also sensibly in dismissing the defunct carrier's unprosecuted application for permanent Nationwide express authority.

From a showing of the correctness of the Commission's post-liquidation action relating to REA's permanent application, it necessarily follows that the temporary authority -- which has as its functional support the pendency of the permanent application -- was properly terminated with the dismissal of the unprosecuted permanent application. The naked temporary authority, thus standing alone, does not constitute an independent license or permit so as as to call into play the full panoply of the Administrative Procedures Act. This is especially so in light of the Commission's regulations which call for the termination of temporary authority with the final determination of the underlying permanent application.

Nor does Pan-Atlantic S.S. Corp. v. Atlantic Coast Line R.R. Co., 353 U.S. 436 (1957), compel a contrary conclusion. There it was held that a temporary authority could be extended to authorize "continuing operations" during the pendency of a permanent application proceeding. Here no permanent proceeding is pending and there are no "continuing operations" whatsoever.

Furthermore, insofar as petitioner attacks the Commission for not allowing Alltrans to step into REA's old shoes, its argument is without merit. If Alltrans is convinced that there is a public need for a Nationwide "full spectrum" truck-oriented express service, it need only file its own permanent and temporary applications for authority to provide such service. Given the easy availability of this alternative, it remains puzzling why Alltrans seeks to succeed expensively to the position of the former applicant when that applicant has expressly repudiated the whole concept.

ARGUMENT

I.

THE COMMISSION WAS FULLY WARRANTED IN SENSIBLY DISMISSING A BANKRUPT AND LIQUIDATED CARRIER'S UNPROSECUTED APPLICATION FOR PERMANENT AUTHORITY

> The Commission must not passively burden the administrative process by failing to recognize factors concerning the probability that a bankrupt and liquidated carrier will not and cannot prosecute its outstanding applications. There is no rationale for failing to dismiss pending applications under such circumstances, unless there is some positive showing that can persuade us otherwise. This is especially true where the concept of the application involves unique factors and considerations and where it is shown that the proposed operation is, in all probability, not feasible and there is little probability that the application would or could be successfully prosecuted. (Order, Nov. 17, 1976, p. 20, emphasis in original).

There, in seemingly unassailable logic, the Commission articulated its central finding which is attacked here on review.

Rule 247(f) of the Commission's Special Rules of Practice, 49 C.F.R. 1100.247(f), provides:

> An applicant who does not intend timely to prosecute its application shall promptly request dismissal thereof. (Emphasis added).

Despite this clear admonition, neither the former management of REA (when it was an industry-owned and controlled agency) nor the management of the "for-profit" REA prosecuted the "hub" application. In fact the new management expressly disavowed the whole "hub" concept and stated that it did not intend to prosecute the application:

> But for REA to pursue to conclusion the permanent application in the Hub case would do the Commission, the public and REA a considerable disservice. For experience demonstrates that the Hub authority precludes REA from providing to the public a modern, efficient and economical express service. The present and future of shippers and REA depends on replacing the Hub and other bits and pieces of motor operating authority it holds with the authority sought herein. Rather than imposing a burden on the Commission, REA's present application will avoid the necessity of a hearing on the Hub authority -- which events have shown cannot do the job -- as well as the numerous pending atomized bits and pieces of regular route authority. For REA will dismiss the Hub proceeding and all other pending applications for motor operating authority upon final approval of the grant of the authority sought. (Exhibit #5 of the Administrative Record p. 13, Petition of REA Express, Inc. For Reconsideration, June 11, 1971). 4/

Given this purposeful inaction on the part of REA, the Commission's forbearance is understood in light of its awareness and deep concern over REA's worsening financial difficulties (Order of Nov. 17, 1976, pp. 10-14, see p. supra). The Commission clearly explained why it did not dismiss REA's unprosecuted application during the last phase of the carrier's life (Order of Jan. 27, 1977):

> . . .even though the Hub application was on file with the Commission for 8 years, the Commission did not thereby abdicate its duty to enforce Rule 247(f); and that the failure to dismiss the Hub application at an earlier date was based on this Commission's desire to allow REA every reasonably (sic) opportunity to develop a practical all-motor operation in light of REA's historically unique rail-related service, and that REA's attempt and failure to do so and its eventual bankruptcy cannot justify its breach of Rule 247(f) and thereby reverse the consequent dismissal of the Hub application.

4/ Clearly at this point, having announced its intention not to prosecute the application, REA should have moved to dismiss its application.

The Commission earlier stated in its November 17, 1976, order:

> Clearly, REA would have failed much sooner had it not been for the forbearance of this Commission (and the motor carrier parties to the application proceeding), in giving REA every possible leeway and not forcing it to go immediately to hearing on matters it was not in a position to prove.

Despite the fact that the Commission patiently allowed REA to try to make a go of its "hub" authority, ironically petitioners now would turn Rule 247(f) inside out and fault the Commission for not dismissing the "hub" application while REA was struggling but alive. This argument ignores both the actual facts of this case and the specific wording of the Commission's Rule which puts the obligation on the applicant to dismiss its application if it does not intend to prosecute it in a timely fashion.

Of course, when an agency's construction of an administrative regulation is in issue, as it is here, courts owe the agency even more deference than they do when the agency is construing its governing statute. Udall v. Tallman, 380 U.S. 1, 16-17 (1965); Bowles v. Seminole Rock Co., 325 U.S. 410, 413-14 (1945). Here, there can be no serious question that it was incumbent on REA, not the Commission, to dismiss its application.

That the Commission, out of extreme concern for REA, refrained from dismissing the unprosecuted application while REA was viable did not foreclose it from doing so after the

carrier was ordered liquidated. That is all the Commission did here. It did not, with one stroke,"destroy a whole mode of transportation." It did not dismiss the application to somehow punish the REA estate for its concededly illegal REXCO operations. It simply exercised good common sense in concluding that a defunct, liquidated, former carrier (or its trustee) could not in any way prosecute its admittedly repudiated application. 5/

That other would-be carriers might want to provide truck-oriented express service is beside the point. The REA hub application was as dead as the applicant. The Commission merely recognized that obvious fact.

5/ The Commission certainly cannot be faulted for this common sense handling of its own calendar. City of San Antonio v. Civil Aeronautics Board, 374 F. 2d 326, 329 (D.C. Cir. 1967).

II

THE TERMINATION OF THE TEMPORARY AUTHORITY APPURTENANT TO THE DEFUNCT CARRIER'S DISMISSED PERMANENT AUTHORITY APPLICATION WAS FULLY IN ACCORD WITH THE LAW

Section 1101.1(a) of the Commission's regulations (49 C.F.R. 1101.1(a) provides:

> (a) Any temporary operating authority granted under 210a(a) or 311(a) of the Interstate Commerce Act (49 U.S.C. 310a(a),911(a)) is continued in force, beyond the expiration date specified in such temporary operating authority, until the determination of an application filed by the holder of such temporary operating authority for a certificate of public convenience and necessity or a permit to engage in operations authorized by such temporary operating authority. (emphasis added).

In construing and applying its regulation to the facts of this case the Commission held (Order of November 17, 1976, p. 20):

> The temporary authority currently outstanding in Sub-No. 2308TA must be revoked inasmuch as the continuation of temporary authority is conditioned upon the pendency of a corresponding permanent authority application (49 C.F.R. 1101), and, we have concluded herein to dismiss that corresponding application.

The Commission's construction and application of its own regulation (49 C.F.R. 1101) and the underlying statute (49 U.S.C. 310a(a)) is entitled to deference by this Court. Udall v. Tallman, supra; Bowles v. Seminole Rock Co., supra. It is also entirely logical and sensible. The bankruptcy and liquidation of an applicant is certainly a reasonable ground for dismissing an unprosecuted and repudiated application. And such an ending of the underlying permanent

application is certainly within the reach of the regulation.

Any contrary result would invest temporary authorities with a life of their own which would somehow survive the demise of an applicant and its permanent authority application. Nothing in law or logic compels such a result. Further, such a state of affairs is entirely inconsistent with the Commission's regulation which holds that a temporary authority granted under Section 210a(a) exists only until the underlying permanent application is determined, 49 C.F.R. 1101.1(a). In short, the regulation clearly holds that a temporary authority cannot outlive the underlying permanent application.

While it is clear that the duration of temporary authority is limited by the pendency of the underlying permanent application, it is equally clear that temporary authority is not such a property right as to call into play the full panoply of the Administrative Procedure Act. Indeed, the statute itself (49 U.S.C. 310a(a) provides that a grant of temporary authority "create[s] no presumption that corresponding permanent authority will be granted thereafter."

The language of Section 210a is clear on its face and leaves no doubt that Congress intended all decisions on temporary authority to be committed to the Commission's discretion. Garrett Freight Lines, Inc. v. United States,

540 F. 2d 450 (9th Cir. 1976); International Detective Service, Inc. v. United States, 346 F. Supp. 608, 611 (D. R.I. 1972). Whether that decision is to grant or deny the initial application, or to revoke or suspend temporary authority once granted, any evidence which supports the result reached demonstrates that the Commission has not acted in an arbitrary or capricious manner or otherwise abused its discretion.

Petitioner's heavy reliance upon Pan-Atlantic S.S. Corp. v. Atlantic Coast Line R.R. Co., 353 U.S. 436 (1957),amounts to a bootstrap attempt to cast the unsupported temporary authority in a position never intended for it by Congress or the Commission. In Pan Atlantic, where there was both an actively exercised temporary authority and a pending permanent application proceeding, the Commission asserted its authority to extend the temporary authority beyond 180 days. The Supreme Court properly focused on the "continuing nature" of the applicant's business to reach its pragmatic conclusion (Id. at 439). Contrary to the petitioner's arguments (Pet. Br. pp.82-83) the Court did not, and indeed could not, find temporary authority to be a license beyond the reach of the Commission's summary process.

In Pan Atlantic the Court spoke in terms of what temporary authority "would seem" to be. (Id.). But it is clear that temporary authority is not a

certificate or a permit at all. National Association of Regulatory Utility Commissioners v. United States, 397 F. Supp. 591, 593, 595 (D.D.C. 1975), aff'd 423 U.S. 1041 (1976). In Pan Atlantic the Supreme Court simply was not dealing with the question of the termination of an unexercised temporary authority along with the dismissal of the underlying permanent application. Nor was it in any way concerned with the Commission's power to revoke a temporary authority for good cause without hearing under Section 210a of the Interstate Commerce Act.

The most relevant case dealing with petitioner's argument concerning the purported APA protections afforded its unexercised temporary authority is Great Lakes Airlines, Inc. v. Civil Aeronautics Board, 294 F. 2d 217 (D.C. Cir. 1961), cert. denied, 366 U.S. 965 (1961). There the Court, after a thorough analysis of the legislative history of the Administrative Procedure Act as it applies to "temporary licenses," rejected an argument that a "temporary license" could only be cancelled after a compliance proceeding had been instituted and the carrier given an opportunity to correct its practices. The Court succinctly outlined the legislative history pertinent here,(294 F. 2d at 223):

> [T]he legislative history of the Administrative Procedure Act makes clear that Section 9(b) was not intended to apply to temporary licenses. Both the Senate14/ and House 15/ Reports contain express statements to this effect. And appended to the Senate Report is a letter from the Attorney General to the Chairman of the Senate Judiciary Committee, containing the following commentary on S. 7, the bill that developed into the Administrative Procedure Act: "The second sentence of subsection (b) [of Section 9] is not intended to apply to temporary licenses which may be issued pending the determination of applications for licenses."16/ To the same effect is the Attorney General's Manual on the Administrative Procedure Act, where it is stated (p. 91): "Such permits or licenses may be revoked without 'another chance' and regardless of whether there is willfulness or whether the public health, interest, or safety is involved." So, even if the action of the Board could be construed to be a withdrawal, suspension, revocation or annulment, within the meaning of Section 9(b), these petitioners are not aided. It is beyond question that their licenses were temporary.
>
> ---
>
> 14/ S. Rep. No. 752, 79th Cong., 1st Sess. (1945), Administrative Procedure Act, Legislative History 212 (1946) [hereinafter cited Legis. Hist.]
>
> 15/ H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), Legis. Hist. 275.
>
> 16/ Legis. Hist. 229.

Here, 5 U.S.C. 558(c) (formerly Section 9(b) of the Administrative Procedure Act) does not give the trustee an automatic right to notice and hearing before a temporary authority can be terminated.[6/] In fact in mounting its argument

---

6/ See Senate Document No. 248, 79th Cong., Administrative Procedure Act, Legislative History, 2nd Sess. 211-12 (1945). See also H.R. Rep. 1980, 79th Cong., Administrative Procedure Act, 2nd Sess. 41 (1946); S. Rep. No. 752, 79th Cong., Administrative Procedure Act, Legislative History, 1st Sess. 26 (1945).

petitioner clearly identifies its most fundamental error in this whole proceeding and judicial review. The Commission did not invoke its process under Section 212(a) of the Interstate Commerce Act, 49 U.S.C. 312(a), to terminate the former REA temporary authority as punishment for the now conceded illegal post-bankruptcy activities of the REXCO Division. The non-appealed cease and desist order was the remedy tailored for that activity.

The termination of the temporary authority was not a punitive remedy but rather was the necessary adjunct to the Commission's common sense dismissal of the liquidated former carrier's unprosecuted and repudiated application for permanent authority.

Furthermore, although not necessary to reach the final result, the Commission's termination of the temporary authority was butressed by a finding of unfitness based on evidence of record. (Order of November 17, 1976, p. 21). A termination of temporary authority on such grounds is well within the Commission's discretion under Section 210a, 49 C.F.R. 1101.4. Such a termination is not a punitive act calling for the protections of Section 212.

But even assuming arguendo that the dismissal of the temporary authority was somehow a punitive remedy for REA's illegal REXCO operations (which we strongly assert it was not), the Commission would still be well within its discretion in selecting such a remedy. Butz v. Glover Livestock Commission Co., 411 U.S. 182, 187 (1973).

The only way REA could begin to conduct the REXCO operations would be under its hub temporary authority. REA's 1,700 fragmented authorities (which themselves are limited to regular route, express operations) simply could not be patched together to support through operations of REXCO's magnitude. But the hub temporary authority is clearly limited to regular route, express operation. In REA Express, Inc., Application for ETA, supra, 117 M.C.C. at 88-89, the Commission warned REA that "irregular route" service would be inconsistent with the carrier's express authority:

> In the REA temporary authority application which immediately preceded the instant application, we noted that "irregular route" service would be inconsistent with express service. The basic indicia of express service have been set forth in previous Commission reports. One index of express service is that the carrier must perform actual operations between all authorized points upon firmly established schedules allowing minimum practicable highway transit time and providing fixed delivery times which are available to actual and potential shippers at authorized origins which in practice are not changed, except after substantial notice to the general public. In essence, this means that express service, whatever else it may be, must be performed as an expedited, regular-route service. Such service is operationally inconsistent with irregular-route service which, in the usual concept, envisions a "call-on-demand," unscheduled operation. (Emphasis in the original, footnotes omitted).

Despite this clear definition, the REXCO Division actively solicited truckload lots for irregular route service. This plain indifference to both statutory requirements and admonitions from the Commission clearly constitutes willfulness within the definition of United States v. Illinois Central Railroad Co., 303 U.S. 239, 243 (1943). And such a "willful" act obviates the need for notice if the Commission's revocation here was made pursuant to Section 212 of the Interstate Commerce Act, 49 U.S.C. §312. As this Court recognized in Dlugash v. Securities and Exchange Commission, 373 F. 2d 107, 110 (2nd Cir. 1967):

> Since petitioners have been properly found guilty of willful violations, they obviously cannot claim insufficient notice to meet the requirements of §9(b) of the Administrative Procedure Act [5 U.S.C. §558(c)] since that statute according to its own terms does not apply "in cases of wilfulness. . ."

But the short of the whole matter is that here the Commission did not invoke its revocation powers under Section 212. It dismissed as unprosecuted, and indeed unprosecutable, permanent application. And with that dismissal went the termination of the appurtenant temporary authority, 49 C.F.R. 1101.1(a).

The termination of the temporary authority was further strengthened by a finding regarding REA's fitness. The Commission found: "Moreover, the performance, under the apparent approval and direction of the trustee in bankruptcy of the improper operations discussed above, shows that REA, as it now exists, is not fit to conduct proper and safe operations." (Order of November 17, 1976, p. 21). This finding, based on evidence of record, would, standing alone, justify the Commission's actions. Nothing under Section 210a or its pertinent regulations requires willful violations to support a finding of unfitness.

But, of course, the finding does not stand alone. The temporary authority had already been terminated by action of law when the underlying permanent application was dismissed.

CONCLUSION

For all the foregoing reasons the orders of the Interstate Commerce Commission should be affirmed.

Respectfully submitted,

DONALD I. BAKER
Assistant Attorney General

MARK L. EVANS
General Counsel

LLOYD JOHN OSBORN
Attorney
Department of Justice
Washington, D.C. 20530

CHARLES H. WHITE, JR.
Associate General Counsel
Interstate Commerce Commission
Washington, D.C. 20423

CERTIFICATE OF SERVICE

I hereby certify that on this, the 18th day of March, 1977, I have served true and accurate copies of the foregoing Joint Brief For The Interstate Commerce Commission And The United States upon counsel for all parties of record, postage prepaid, as follows:

Richard H. Streeter, Esq. (First class)
Edward K. Wheeler, Esq.
Wheeler & Wheeler
704 Southern Building
Washington, D.C. 20005

John W. Bryant, Esq. (Air mail)
Eames, Petrillo & Wilcox
900 Guardian Building
Detroit, MI 48226

Phillip Robinson, Esq. (Air mail)
Robinson, Felts, Starnes & Nations
P.O. Box 2207
Austin, TX 78701

Todd A. Peterman, Esq. (First class)
Nelson J. Cooney, Esq.
American Trucking Assns., Inc.
1616 P Street, N.W.
Washington, D.C. 20036

Daniel C. Sullivan, Esq. (Air mail)
Singer & Sullivan
327 South LaSalle Street
Chicago, IL 60605

Jack R. Turney, Jr., Esq. (First class)
Robert R. Redmon, Esq.
J. William Cain, Jr., Esq.
2001 Massachusetts Ave., N.W.
Washington, D.C. 20036

David J. Fleming, Esq. (First class)
Reilly, Fleming & Reilly
1414 Avenue of the Americas
New York, N.Y. 10019

William J. Donlon, Esq. (Air mail)
Brotherhood of Railway
and Airline Clerks
6300 North River Road
Rosemont, IL 60018

James L. Highsaw, Esq. (First class)
John O'B. Clarke, Jr.
Highsaw, Mahoney & Friedman
1050 17th St., N.W.
Washington, D.C. 20036

Lloyd John Osborn, Esq. (First class)
Department of Justice
Washington, D.C. 20530

CHARLES H. WHITE, JR.
Associate General Counsel